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ORIGINAL SUPREME COURT OF THE UNITED STATES

NO. 89-5120

ORIGINAL

MICHAEL OWEN PERRY,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF RESPONDENT, THE STATE OF LOUISIANA, IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

RENE I. SALOMON
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA
P.O. BOX 94095
BATON ROUGE, LA. 70804
TELEPHONE: 504/342-7552

43 pp

TOPICAL INDEX

TABLE OF AUTHORITIES

ISSUES PRESENTED

I. May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?

II. Assuming that: (1) competency to be executed may be medically achieved and maintained without the prisoner's consent, and (2) the condemned inmate has a constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to treatment?

SUMMARY OF THE ARGUMENT

The State of Louisiana argues that this Honorable Court in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986) implicitly recognized that competency to be executed could be achieved and maintained through the administration of antipsychotic medication. While the Eighth Amendment under Ford prohibits the execution of the insane, post-conviction insanity was defined [as a condemned inmate who was unaware of his impending execution and the reason for it] by Justice Powell in his concurring opinion. Competency is the sole inquiry; how that competency is achieved and maintained is not a factor. Medication can help assure the inmate that he will be aware of his impending death and the reason for it. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

The administration of the antipsychotic drug Haldol to the petitioner does not violate his rights under the Eighth Amendment. Haldol is a medically recognized treatment for anyone suffering from schizoaffective disorder. The medication is not given to the petitioner because he brutally murdered five members of his family, but is given to assist the inmate in maintaining competency.

This Honorable Court in Penry v. Lynaugh, __ U.S. __, 109 S.Ct. 2934, ____ L.Ed.2d ___ (1989), held that the Eighth Amendment does not prohibit per se the execution of an inmate who is mentally retarded. A fortiori, a death row inmate who is mentally ill and whose competency for execution is achieved and maintained by medication should have no greater right than a mentally retarded inmate, whose mental state cannot be improved through medication. The State of Louisiana argues that

once a mentally ill inmate has been sentenced to death, his mental illness is irrelevant unless it affects the de minimus competency standard as outlined in Ford.

A pre-trial detainee may be subjected to trial despite the fact that his competency is achieved and maintained by medication. Louisiana has recognized this principle in its jurisprudence since 1969. Because a condemned inmate is entitled to diminished constitutional protections, he should not be afforded greater rights than a presumptively innocent individual who faces trial. Once a condemned inmate is declared competent for execution, his medication should be a factor only if it impinges upon the de minimus competency requirement.

The State of Louisiana does not concede that Michael Perry has a liberty interest to be free from the forcible administration of an antipsychotic drug that is designed to achieve and maintain competency for execution. However, if such a "right" exists, the State argues the liberty interest was extinguished when a validly imposed sentence of death was rendered by the jury. In the alternative, should the Court hold that Perry retained his liberty interest despite his conviction, the State of Louisiana argues that his interest must give way to the State's overriding and legitimate interest in carrying out the sentence retribution.

Despite the inmate's wishes, the State of Louisiana, under its parens patrie and police powers, has an affirmative duty to provide all incarcerated inmates with adequate psychiatric care, including the administration of antipsychotic medication. Deliberate indifference to the inmate's mental health violates his constitutional guarantees under the Eighth Amendment.

Both federal and state statutes subsume the necessity of medical treatment with a judicial finding of incompetency to proceed to trial. A death row inmate who has raised the shield of incompetency to proceed to execution has implicitly authorized the State to medicate him, if necessary, to achieve competency.

The petitioner has the burden to prove a national consensus against forcibly medicating death row inmates. He has failed to do so. Furthermore, the petitioner's counsel has not established a conflict in the district courts, which allow forcible medication of civil committees and pre-trial detainees, provided professional judgment is exercised, and judicial review is provided.

The trial court's determination of competency to be executed (i.e., competent only when medicated) was made in accord with Ford v. Wainwright. The procedural due process which governs the inquiry into competency to be executed requires that the State afford the condemned inmate with: (1) an "opportunity to be heard"; (2) an opportunity to challenge the experts' competency findings; and (3) an impartial decisionmaker. Inmate Perry enjoyed procedures far in excess of de minimus constitutional standards. Further, the trial court's conduct of the proceedings was eminently fair and conscious of the significance of the proceeding.

The trial court ordered treatment of the condemned inmate premised upon the findings of competence only when maintained on medication. The treatment order was made in accord with this Honorable Court's decision in Vitek v. Jones, which implicitly recognized that nonconsensual treatment may occur as a result of a determination that treatment is needed. Alternatively, if due process requires an additional decisionmaking process prior to nonconsensual treatment, then such decision is left to the professional judgment of medical personnel at the custodial institution.

INTRODUCTION

In Ford v. Wainwright 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986), this Honorable Court held that a state could not impose the death penalty upon a prisoner who had become insane subsequent to his conviction. To do so, the majority of this Court concluded, would be cruel and unusual punishment under the Eighth Amendment. Writing for the plurality, Justice Marshall stated that neutral, expert opinions should allow a court to focus on "the prisoner's ability to comprehend the nature of the penalty" and that the condemned inmate's mental illness must prevent him from "comprehending the reasons for the penalty or its implications." Ford 106 S.Ct. at 2606. Justice Powell, concurring in part and concurring in judgment, was the only justice to directly address the standard by which post-conviction competency should be measured. That standard - whether the condemned inmate is aware of his impending execution and the reason for it - has subsequently been cited with approval by Justices Brennan and Marshall, in Johnson v. Cabana, ___ U.S. _____, 107 S.Ct. 2207, ___ L.Ed.2d ____, (1987) (Brennan, Marshall, J.J., dissenting) and most recently, in Penry v. Lynaugh, ___ U.S. _____, 109 S.Ct. 2934 (1989), ___ L.Ed.2d _____, (1989). In Penry this court held, in part, that the Eighth Amendment did not prohibit the execution of a

mentally retarded person with the reasoning ability of a 6 1/2-year-old child. Ford, furthermore, was cited in Penry for the premise that "someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed." Penry, 45 Cr.L. at 3196 (1989), citing from Ford, 477 U.S. at 422 (1986) (Powell, J., concurring in part and concurring in judgment.)

New questions which necessarily evolved from the Ford and Penry decisions are now before this Honorable Court. Is a death row inmate's execution stayed simply because his competency is achieved and maintained by medication? May a condemned inmate refuse medication that is designed to achieve and maintain competency as a means to thwart the imposition of a legally imposed death sentence? Does a death row inmate have a constitutional right to choose insanity over the electric chair? The State of Louisiana respectfully argues that the competency constitutionally mandated by Ford may be achieved and maintained, if necessary, through nonconsensual, medically supervised treatment, including the administration of antipsychotic medication. The authorities discussed below indicate that a death row inmate simply cannot be allowed to choose insanity as a means of granting his own personal stay of execution.

Petitioner, death row inmate Michael Owen Perry, is before this Court seeking writ of certiorari primarily on the grounds that the nonconsensual, medically supervised administration of the antipsychotic drug Haldol to meet the Ford standard violates his rights under the Eighth and Fourteenth Amendments. Before addressing these issues in detail, the State of Louisiana first would like to alert this Court to the many inaccuracies contained in the petitioner's brief. First, there is no evidence in the record that Michael Owen Perry has ever been medicated against his will.[1] Any medication administered, has been only upon his physician's

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1. Counsel for the petitioner can point to no record reference that shows that Michael Owen Perry has been forcibly administered either oral or intramuscular medication. The State of Louisiana, thereby, questions whether Perry even has standing upon which this issue may be addressed.

order and directive, and administered only at regulated intervals.[2] While on medication, Perry's mental condition stabilizes so that he is not a danger to himself or others. The medication eliminates Perry's delusions and hallucinations. At times, Perry himself has requested the medication. An additional benefit is that Perry's competency for execution is also maintained. It is this latter benefit that troubles Perry.

Relying on Louisiana's jurisprudence that adopted the Ford standard as the de minimus test for competency to be executed, the Nineteenth Judicial District Court, Parish of East Baton Rouge, Louisiana, ruled on October 21, 1988 that Michael Owen Perry is competent to be executed because "he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment." (R. pp. 0784-85.) The district court's holding was bifurcated. While Perry is competent to be executed, that competency is achieved and maintained only through the administration of Haldol. (R. p. 0005). This implies that Perry is not competent for execution in his unmedicated state. There is no dispute that Perry suffers from schizoaffective disorder; all doctors who have examined him have made the same diagnosis. The mental illness, however, can be controlled through the use of antipsychotic medication, much like diabetes is controlled by insulin injections. The structure of this brief will be first to establish the arguments underlying the State's position that medically induced competency is constitutionally acceptable under Ford. Next, the State will argue that a condemned inmate must be medicated without his consent if such medication is necessary to carry out a legally imposed death sentence. Finally, the State will address the procedural due process protections that may be required for the condemned inmate.

The State of Louisiana respectfully contends the sole focus should be on competency, regardless of how it is achieved or maintained, and regardless of whether the condemned inmate consents to the necessary medical treatment or not. Otherwise,

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2. Medication is administered routinely (R. p. 0753-54) that is, one monthly intra-muscular injection and a daily oral supplement three times per day. Doctors also testified that Perry's condition only improves with medication. (R. p. 0557). Counsel for the petitioner has stated that Perry decompensates even while on "massive" dosages of antipsychotic medication. This statement is taken out of context. In fact, Dr. Cox testified that if Perry was still hallucinating despite the medication, one solution was to increase the dosage. (R. p. 0737-38). Perry must be on a consistent medical treatment plan for three months just to stabilize his mental state. (R. p. 0742-44).

a death row inmate has the power to thwart the State's attempt in carrying out a validly imposed death sentence. Most importantly, the State of Louisiana beseeches this Honorable Court to deny the petitioner's request for writ of certiorari. As stated above, there is no evidence in the record that Perry has ever been forcibly medicated. Furthermore, Perry has pointed to no conflict in the district courts concerning the relevant legal issues.

ISSUE I.

May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?

ARGUMENT

1. Ford v. Wainwright implicitly recognizes that medically aided competency achieved by the administration of antipsychotic medication is acceptable for purposes of competency to be executed.

The State of Louisiana contends that medically aided competency is sufficient competency for execution under the Eighth Amendment. The rationale behind the competency standard as announced by Justice Powell, is to ensure that the two major purposes of the death penalty - retribution and deterrence - are served. Synthetic competency serves both purposes. First, the antipsychotic medication assures the mentally ill condemned inmate that he has sufficient mental capacity to understand that he is being executed for the crimes he committed. Thus, retribution is served. Second, the medication achieves and maintains competency so that the execution may lawfully take place. Therefore, the deterrent factor for society as a whole is served.

The State's position that synthetic competency is sufficient under Ford is further supported by the reasons for requiring that a minimum competency level be met. A stay of execution under Ford is not triggered unless the condemned inmate is so mentally deficient that he is unaware of his impending execution and cannot comprehend the reason for it. The medication itself has no bearing on the reasons competency is required. Either the inmate is competent or he is not. If anything, medication actually enhances an inmate's level of competency. Therefore, the inmate's competency, whether or not medication is involved, should be the sole inquiry.

The resolution of this issue may very well affect the State of Louisiana's right to demand retribution from this petitioner. Expert testimony at Perry's sanity hearing was unanimous that Perry, medicated or not, presently knew of his impending death and the reason for it. Dr. Cox expressed the opinion, however, that if Perry is allowed to remain off

antipsychotic drugs for as little time as three weeks, Perry may decompensate to the point of being incompetent for execution. (See Dr. Cox's report, dated April 20, 1988). Therefore, under the Ford standard, the State of Louisiana's right to seek retribution against Perry may very well be hinged upon its right to forcibly medicate him, if necessary. A death row inmate should not be allowed to escape execution under Ford by refusing medication necessary to achieve or maintain competency.[3]

If medication is a factor in the competency equation than this presupposes that a mentally ill capital offender has greater constitutional rights than a capital offender who is not mentally ill. Furthermore, medicine administered to a condemned prisoner to prevent delusions and hallucinations also can only enhance that inmate's chance "to prepare mentally and spiritually, for their death" as Justice Powell said in Ford, citing Coke. Ford, 105 S.Ct. at 2608. The Eighth Amendment assures an inmate that he will be given time to prepare for his death, and that he will know the reason why his life is being extinguished. Medication satisfies the Eighth Amendment mandate that these assurances are met. If Perry is allowed to avoid his death sentence by refusing to submit to medical treatment, the result would be that a death sentence would be decided on the fortuity of whether the condemned inmate voluntarily chose to be medicated or not. Mentally ill death row inmates would thereby have greater rights than those who are not mentally ill.

The State's position that a mentally ill death row inmate has no greater rights than any other death row inmate is further supported by the Court's opinion in Murray v. Giarratano, ___ U.S. _____, 109 S.Ct. 2765, ___ L.Ed.2d _____ (1989), 45 Cr. L. 3155. Giarratano held that in a post-conviction proceeding, a state could validly deny under the Eighth Amendment and the Due Process Clause appointed counsel for an indigent offender, whether or not the offender was sentenced to death row. In other words, this Court recognized that a capital offender had no greater right to counsel during post-conviction relief, than did a non-capital offender. Likewise, the State of Louisiana posits that the

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3. The record clearly supports a strategy between Perry and his counsel to refuse medication, and thereby induce insanity as a loophole to execution. (R. pp. 0753-54; 0717-18). Perry himself said: "...[I]t's just -- it's very simple to understand, take my pills and die, don't take my pills and live ... so I'm not going to take my pills." (R. p. 0717-18).

status of mentally ill should not carry with it greater constitutional protections. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

While Ford did not directly address the issue of synthetic competency, the words of Justice Powell intimate that medication to achieve sanity is presumed to follow a stay of execution:

> "It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless OR UNTIL he recovers his sanity cannot be deprived without a 'fair hearing'." Ford 106 S.Ct. at 2609 (Powell, J., concurring). (Emphasis provided).

Justice Powell's footnote in Ford even more clearly establishes that competency achieved through medication would satisfy the Eighth Amendment. As Justice Powell so aptly stated in his opinion, the question is not WHETHER Perry will be executed, but WHEN. Justice Powell continued in a footnote:

> "It is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that IF PETITIONER IS CURED OF HIS DISEASE, THE STATE IS FREE TO EXECUTE HIM." Ford, 106 S.Ct. at 2610 (Powell, J., concurring) (footnote No. 5). (Emphasis provided).

These words of Justice Powell indicate that once incompetency is judicially established, the condemned inmate should then be treated in an attempt to restore sanity. Once sanity is restored, the inmate is again eligible for execution. This is precisely the procedure recognized at common law in Louisiana since 1896. (See State's Brief to the Louisiana Supreme Court, Appendix A, p. 96). Treatment of a mentally ill prisoner necessarily implicates medication; otherwise, in most instances, no cure or remission of the illness is possible. Therefore, the State of Louisiana respectfully submits that competency, whether or not medication is involved, is all that Ford requires.

(a) The administration of antipyschotic medication to a mentally ill prisoner is not cruel and unusual punishment.

The petitioner's counsel has equated Perry's medication as punishment itself under the Eighth Amendment, which is an incorrect conclusion. The Eighth Amendment only

prohibits cruel and unusual PUNISHMENT. The punishment in this case is death by electrocution, a validly imposed sentence under the Eighth Amendment, which is applicable to the states through the Fourteenth Amendment. Haldol is a medically recognized treatment for anyone afflicted with Perry's mental illness. Haldol is not being administered to him because he premeditated the execution of five family members including his parents and a 2-year-old nephew. Haldol is a medicine prescribed for many individuals who suffer from mental illnesses or disease. Therefore, opposing counsel is misdirecting the Court's attention when they attempt to argue that the medication administered to Perry is cruel and unusual punishment under the Eighth Amendment. At best, the medication is an indirect means by which a punishment that is sanctioned by the Eighth Amendment may be carried out.

The State can best illustrate its position that Haldol itself is not punishment by pointing to an outstanding All-American basketball player, Chris Jackson of Louisiana State University. Jackson, who takes Haldol on a daily basis for a neurochemical disorder called Tourette's syndrome, needs the medication to avoid uncontrollable twitching and spasmodic body movements. (See Appendix A, p. 162). This example further illustrates as absurd any of the petitioner's arguments that equate the administration of Haldol to Perry as the equivalent of a frontal lobotomy.

The sincerity of opposing counsel's concern for Perry's well-being is also suspect, at best. Petitioner's counsel, Keith Nordyke, had ordered Perry <u>abruptly</u> removed from his medicine just prior to an upcoming courtroom appearance, without any consideration whatsoever for the consequences that are suffered with sudden withdrawal from antipsychotic medication. Nordyke's "Do-Gooder" motion was in actuality an attempt to induce a calculated insanity as a means to avoid a validly imposed death sentence. Nordyke's decision was aimed at defeating the death penalty, even if that meant Perry may become insane. Ironically enough, Nordyke himself is attempting to sentence Perry to a life of incarcerated insanity, which is certainly a cruel and unusual punishment under the Eighth Amendment. Now he appears before this Honorable Court to argue that the administration of medication, to which all doctors have testified alleviates the symptoms of Perry's illness while at the same time achieves and maintains competency, is cruel and unusual punishment.

In fact, the medicine is in both Perry's and the State's best interests. Dr. Cox, one of Perry's treating

psychiatrists, has recommended that Perry be treated with Haldol. The trial court during Perry's competency hearing questioned Dr. Cox concerning the medication, and asked whether any less intrusive medicine could stabilize and improve Perry's mental state. Dr. Cox responded: "No, sir, I believe that he needs to remain on the class of drugs known as antipsychotic drugs..." (R. at p. 0745). Professional medical opinion, thereby, supports the administering of Haldol to Perry as the means best designed to serve his medical needs. At the same time, Haldol serves the State's purpose of achieving and maintaining competency for execution. There is also no alternative, less intrusive, medication that will satisfy the same needs.

Opposing counsel has also strenuously objected to the administration of antipsychotic drugs because of side affects that may occur. Yet nothing in the record supports the fact that Perry now suffers from any side effects. Dr. Cox stated he has never seen Perry suffer from any side effects (R., p. 0746) and that he does not now suffer from tardive dyskinesia. (R., p. 0574-75). Dr. Cox also predicted that even if Perry was continuously medicated with antipsychotic medication for the next five years he had only about a one in four, or one in five, chance of developing tardive dyskinesia, the most severe possible debilitating side effect. (R., p. 0574-75). There is also evidence in the record that Perry may pretend to suffer from some of the lesser side effects, such as drooling and impairment of his movement. (R. pp. 0527-9). The benefits of Haldol clearly outweigh any minor side effects. At the same time, many side effects themselves can be controlled by medication. Ironically enough, while Nordyke has criticized the State of Louisiana for allegedly administering Haldol to Perry because of these possible side effects, his own order to abruptly stop all medication subjected Perry to identical side effects. Sudden withdrawal from Haldol may cause a patient to suffer dyskinetic movements indistinguishable from tardive dyskinesia. (See Appendix A, p. 163).

(b) <u>Ford v. Wainwright and Penry v. Lynaugh support the death penalty for mentally ill inmates whose competency is achieved and maintained through medication</u>.

Decisions of this Court support the argument that a death row inmate's mental state - be it mental illness or mental retardation - is not itself dispositive of whether or not the inmate is eligible for execution. <u>Ford</u> illustrates the argument that mental illness per se is not a bar to imposing

the death penalty. If this were true, there would be no need for a de minimus competency standard. A physician's diagnosis alone that the inmate was suffering from a mental illness would automatically commute a death sentence to life imprisonment. Also implicit in Ford is the proposition that a mentally ill condemned prisoner whose competency is achieved and maintained by medicine may be subjected to the death penalty. The only requirement is that the inmate be aware of his impending execution and the reason for it.

This Court also expressly held in Penry that a mentally retarded prisoner may be subjected to the death penalty. Mental retardation, unlike mental illness, is a permanent condition unaffected by medication. A fortiori, a mentally ill death row inmate whose competency is achieved by medication should have no greater rights than a mentally retarded death row inmate, whose mental state is unalterable. As Penry established, a jury should consider mental retardation and the defendant's history of child abuse as mitigating evidence in the sentencing phase. In Perry's case the jury considered and rejected his history of mental illness as a reason to not impose the death penalty. The State's position is that, once a death sentence is validly imposed, evidence of mental illness or mental retardation is irrelevant under Ford unless it affects the de minimus competency standard. The only focus should be whether the Ford competency test is achieved. The Eighth Amendment does not otherwise prohibit execution of a competent prisoner regardless of the inmate's mental status.

(c) Synthetic competency has been recognized as sufficient competency under which a presumptively innocent individual stands trial. Therefore, a convicted murderer whose competency is achieved and maintained through medication should have no greater right.

Louisiana's jurisprudence had recognized that synthetic competency is sufficient competency upon which a defendant may stand trial. See State v. Hampton, 218 So.2d 311 (La. 1969) and State v. Lawrence, 368 So. 2d 699 (La. 1979). Decisions of the Louisiana Supreme Court and the First Circuit Court of Appeals have also approved compelled medication as a condition precedent to release of insanity acquittees. See State v. Collins, 381 So. 2d 449 (La. 1980), and State v. Boulmay, 498 So. 2d 213 (La. App. 1 Cir. 1986). Historically, the Louisiana courts look to the individual's present condition only. How that person's competency is maintained or achieved has no bearing upon whether that person is competent for trial, or eligible for discharge from a commitment. Because Perry's

writ application to the Louisiana Supreme Court was denied, the State of Louisiana can only assume that this analysis applies with equal force, regardless of whether the question is competency for trial, competency for discharge or competency for execution. The State believes that Perry and his counsel would become the most outspoken advocates of the Haldol medication if it meant that Perry would be freed from prison; and certainly opposing counsel would be alleging constitutional violations if Perry had been denied medical treatment prior to trial. Opposing counsel's true objection is the death penalty itself, not the Haldol treatment or the synthetic competency.

Two members of this Court suggested in Vincent v. Louisiana, 469 U.S. 1166, 105 S.Ct. 928, 83 L.Ed.2d 939, reh. den. (1985) (J J. Brennan, Marshall dissenting) that a mentally ill defendant may have been denied a fair and impartial trial because he was denied the antipsychotic drug Thorazine. Justice Brennan wrote: "There can be no doubt that, if Vincent was in fact deprived of his Thorazine during trial and this deprivation rendered him incompetent to stand trial, he is entitled to have his conviction vacated." Vincent, 105 S.Ct. at 930. This passage certainly implies that synthetic competency to stand trial is constitutional, indeed even required. If synthetic competency is permissible, and, in view of the Vincent dissent, constitutionally mandated prior to conviction, then it must also be acceptable during a post-conviction proceeding as well.

The State of Louisiana further contends that competency is not contingent upon whether the individual is medicated or not. Competency is competency, regardless of medical treatment. The Fifth Circuit of the U.S. Court of Appeals in U.S. v. Haynes, 589 F.2d 811 (5th Cir. 1979) agreed. In Haynes a former police chief had been convicted of aggravated assault and depriving another of his right to liberty without due process of law, resulting in his death. On appeal, the defendant claimed he had been incompetent to stand trial because his competency had been attained through medication. The Fifth Circuit rejected this claim.

> Nonetheless, it is argued that without large doses of Aventyl (an anti-depressant) and Mellaril (an "anti-psychotic" drug), defendant would be incompetent.... The court's inquiry is limited to determining whether defendant is able to assist in his defense and comprehend the nature of the proceedings against him. Once it is determined that he is competent to stand trial, the method of

> achieving that competence is of minor import. This is not to imply that drug maintenance is irrelevant in determining competency. Rather, all factors relating to perception and facility are to be considered. However, once it is determined that the accused has the requisite mental capacity, his method of maintaining that capacity is significant only in the area of continued competency throughout the proceedings. U.S. v. Haynes, 589 F. 2d at 823 (5th Cir. 1979). (Emphasis provided).

The State of Louisiana respectfully submits that if a defendant's competency for trial may be constitutionally maintained and achieved by medication, then it is also constitutional that a death row inmate's competency for execution may be maintained and achieved by medication. Justice O'Connor stated in Ford that a death row inmate has fewer constitutional protections post-conviction than what were afforded him prior to conviction. "...[O]nce society, has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." Ford, 106 S.Ct. 2612 (O'Connor, J., concurring in part, dissenting in part). If synthetic sanity is acceptable at a time when the Constitution affords its greatest protection, then it must logically follow that synthetic sanity is acceptable when the Constitution's demands have diminished.

2. A death row inmate does not have a "right" to be free from nonconsensual medical treatment that is designed to achieve and maintain competency for execution.

The State has chosen the word "right" to define whatever Perry is claiming for lack of a better word. The first question is: what is the "right"? Is it the "right" to be free from involuntary medication? In the context of a death penalty case, this "right" would have even more implications. Of crucial importance is that the medication is designed to achieve and maintain competency for execution. If this Court were to recognize a death row inmate's "right" to refuse medication, a necessary corollary question would arise: Does a death row inmate have the "right" to induce insanity? A diligent search by the State found no guidance from this Court on whether Perry would have a constitutionally recognized right to be free from a medication that is designed to achieve and maintain competency, and thereby have a "right" to induce

insanity. The source of such a "right" is also unclear in this Court's jurisprudence, on whether it may be a liberty interest or a state-created interest enforceable through the Due Process Clause. Perry has neither identified the authority that supports his claimed liberty interest, nor proven its source from either federal or state law. Instead, the petitioner has asserted his rights in a laundry-list fashion without further explanation. (Pet.'s Brief, p. 23)[4]

The State of Louisiana is not willing to concede that Perry has a protected liberty interest to avoid forcible medication with the antipsychotic drug Haldol. This Court has not declared such a right. In fact, in Mills v. Rogers 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982), Justice Powell expressly reserved the ability to address the question of whether such a "right" does exist under the federal constitution itself. The Mills case was a class action suit by mental patients who were claiming, among other things, that the forcible administration of antipsychotic drugs violated their rights under the federal constitution. The parties involved accepted as a given that this protected liberty interest existed under the federal constitution. In dismissing such a "right", Justice Powell stated:

> As do the parties, we assume for purposes of this discussion that involuntarily committed mental patients do retain liberty interests protected directly by the Constitution,...and that these interests are implicated by the involuntary administration of antipsychotic drugs. Only 'assuming' the existence of such interests, we of course intimate no view as to the weight of such interests in comparison with possible countervailing state interests. Mills 102 S.Ct. at 2448. (Footnote No. 16; citation omitted).

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4. Because the petitioner's counsel in their brief to this Court discussed the Eighth and Fourteenth Amendment arguments in a illogical manner, the State of Louisiana was unable to distinguish exactly what "rights" the petitioner was claiming were violated, and from what source those "rights" emanated. Therefore, the State has chosen to address issues it believes are underlying this petition, and then address the petitioner's concerns in relation to those issues. The State will not re-address issues based on state law. Those issues including the standard of competency for execution in Louisiana are briefed in Appendix A. The Louisiana Supreme Court in State v. Perry, ___ So.2d _____(La. 1989) Nos. 88-KD-2239 and 89-KA-0159, (May 12, 1989; reconsideration denied, State v. Perry, ___ So.2d ___ (La. 1989) (June 16, 1989) ruled against the petitioner.

Until directed otherwise, the State is hesitant to recognize a "right" that has no textual source and has not been identified by this Court as emanating from the Constitution itself. Therefore, there is no presumption in the case at bar that such a "right" exists.

(a) Assuming arguendo that a death row inmate does have a constitutionally protected liberty interest, that interest was extinguished upon the imposition of a valid death sentence.

If this Court should find that such a protected liberty interest does exist, the State responds that a death row inmate's interest in being free from a medication that is designed to achieve and maintain competency for execution was extinguished upon the imposition of a sentence of death. Such an extinguishment of a liberty interest is understood in many contexts. For instance, a defendant loses his liberty interest to be free from confinement once a jury returns a verdict of guilty as charged. In a death penalty case, the condemned inmate further loses his right to life once a legally imposed sentence of death is declared. A death row inmate's status alone mandates special consideration not found in any other context. For instance, the liberty interest of an involuntarily committed individual who has committed no crime cannot be on par with an individual who is responsible for five brutal killings. We must not forget that the medication is aimed at achieving and maintaining competency for carrying out the jury's decision. Society itself demands only one conclusion. Any liberty interest Perry may have had was extinguished when the jury rendered its sentence of death.

This Court in Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532 (1976), 49 L.Ed.2d 451 recognized that a prisoner who was validly convicted and sentenced does not retain a liberty interest to remain in any one particular prison. On the contrary, the state has the authority to transfer the prisoner to any of its prisons. The court stated: "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in ANY of its prisons." Meachum 96 S.Ct. at 2538, (Court's emphasis).

Perry was placed on death row with the expectation that some day, after he had exhausted all avenues of appeal, the State of Louisiana would execute him. Perry's expectation, therefore, is opposite to that of the inmate in Vitek v. Jones,

445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980). Justice White, in writing for the majority, had held that the involuntary transfer of an inmate from a prison to a mental hospital did require procedural protections under the due process clause, based upon a liberty interest created by a Nebraska statute that had allowed for such a transfer. The Court's reasoning focused on the fact that the prisoner could not have reasonably anticipated confinement in a mental hospital at the time he was convicted and sentenced. In contrast, Perry knew that the State of Louisiana would do everything within its power to carry out the legally imposed sentence of death. Medication to achieve and maintain competency for execution is within the range of expectations likely to confront any condemned inmate whose mental illness had been judicially established. Perry himself has raised the shield of mental incompetency as a reason not to carry out a lawfully imposed sentence. Do we now let him turn that shield into a sword by refusing medication in an attempt to thwart society's legitimate interest in retribution? Implicit in the death row inmate's questioning of his competency is the State's authority to treat him if necessary to achieve or maintain competency for execution. Medication of a mentally ill inmate is reasonably expected. In direct contrast to Perry's case, the inmate in Vitek could not have expected that his prison term would include involuntary transfer to a mental hospital. For Perry, it is within the range of conditions of his conviction and sentence that he submit himself to treatment so as to maintain his competency to be executed.

The State of Louisiana also maintains that nonconsensual medication to achieve and maintain competency is within the legitimate limits of this State's authority to carry out Perry's sentence. This Court in Montanye v. Haymes 427 U.S. 236, 96 S.Ct. 2543 (1976), 49 L.Ed.2d 466 stated: "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." Montanye 96 S.Ct. at 2547. The medication of Perry is a necessary concomitant to carrying out his sentence of death. Therefore, any liberty interest to refuse reasonable and nonarbitrary medical treatment was extinguished contemporaneously when Perry's liberty interest to life was extinguished - that is, when Perry's sentence of death was imposed.

The State does recognize that Perry may still retain a residual liberty interest. While a conviction and subsequent

death sentence greatly diminish a death row inmate's constitutional rights, he does not forfeit all such protections. Wolff v. McDonnell 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) recognized that "the touchstone of due process is protection of the individual against arbitrary action of government." The State concedes that Perry may have a liberty interest to avoid experimental drugs or extreme medical procedures that are outside the mainstream of professional medical practice. Haldol is not such a drug; it is a well recognized, medically acceptable treatment for anyone suffering from schizoaffective disorder. The nonconsensual administration of Haldol to Perry is an appropriate and reasonably anticipated measure by the State of Louisiana to assure his competency for execution.

(b) In the alternative that a condemned inmate does retain a liberty interest to refuse medication despite his conviction, the State has an overriding interest to ensure that his death sentence is implemented.

Assuming the condemned inmate has a liberty interest under the Fourteenth Amendment to refuse mental health treatment and thereby induce insanity, the State has an overriding interest to seek retribution under a validly imposed death sentence. In Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) this Court recognized a balancing of the state's legitimate security interests against the inmate's privacy interests when it held that the Fourth and Fifth Amendments did not prohibit the visual body-cavity searches of pre-trial detainees following contact with outside visitors. The Court found that the search was a reasonable response to a legitimate security interest.

In this case, the State of Louisiana is asserting that its legitimate interest of retribution outweighs any retained liberty interest by the condemned inmate to refuse medication that is designed to achieve and maintain competency for execution. If necessary, the state should have the authority to forcibly medicate Perry so that the execution may proceed. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, (1976) this Court reaffirmed that the Eighth Amendment is subject to a flexible interpretation that "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 598 2 L.Ed.2d 630 (1958). State legislatures by statute have approved forcibly medicating inmates if necessary. The jurisprudence of this Court indicates that only excessive punishment, either because it involves the

unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the crime, is prohibited under the Eighth Amendment. Execution while the inmate is medicated with Haldol is neither excessive nor disproportionate. The State of Louisiana contends that Perry had not proven that his execution effectuated through the nonconsensual treatment with Haldol is a sanction that is imposed without any penological justification and "results in the gratuitous infliction of suffering." Gregg 96 S.Ct. at 2929. Perry's medical treatment is not being inflicted in an arbitrary or capricious manner; it is the same treatment afforded anyone with schizoaffective disorder. Perry just happens to also be on death row. To allow Perry a constitutional right to refuse medical treatment that is designed to achieve and maintain competency for execution is to deny the people of the State of Louisiana their legitimate right to retribution. "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law." Furman v. Georgia, 408 U.S. 238, 308, 92 S.Ct. 2726, 2761, 33 L.Ed. 2d 346 (1972) (Stewart, J., concurring).

The Ford opinion itself recognized the state's interest in retribution, thereby requiring that the condemned inmate know of his impending death and the reason for it. Otherwise, if the inmate lacks this capacity, his execution as to him is meaningless. Justice Powell called the state's interest in carrying out a validly imposed death sentence "a substantial and legitimate interest in taking petitioner's life as punishment for his crime." Ford 106 S.Ct. at 2610 (Powell, J., concurring).

Other factors in the balancing of interests prove that the benefits of the Haldol medication outweigh any possible side effects. There is no evidence in the record that Perry has suffered any side effects. It is also important to note that a symptom of the illness is to refuse medication. Medication is also required as a starting point before any behavior modification therapy may be administered. The only adverse impact that Perry has alluded to is the possibility of contracting tardive dyskinesia five years from now, and then the chances of that occurring are, at worst, one in four.

Opposing counsel in their brief to this Court conceded that an incompetent inmate could be forcibly medicated by the state. Their brief to this court repetitiously recites that

Perry is insane. The record, however, fails to prove that Perry has ever been adjudged insane, either at the commission of the crime or at trial. Assuming arguendo that Perry was and is insane, his counsel then asserts: "Non-consensual medication is permitted only upon a finding of incompetence." (See Pet.'s Brief, p. 11). This assertion leads the State to conclude that our opposing counsel has conceded to the state its authority to medicate Perry against his will "upon a finding of incompetence.".

3. The State of Louisiana has a duty to provide medical treatment to all prisoners including mentally ill death row inmates.

Beginning with the premise that Perry is insane, as his counsel so adamantly argues, Perry's lawyers then also posit that Perry is competent to refuse needed medical treatment. In other words, an "insane" murderer knows treatment with Haldol is not in his best interest. The lack of logic of this argument is self-evident. However, even if one ignores this nonsensical line of reasoning, opposing counsel still has yet to address a very important argument that supports nonconsensual medical treatment - that is, the affirmative duty placed upon the State of Louisiana to provide adequate medical care to its incarcerated inmates.

In Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), this Honorable Court recognized a state's legitimate interest under its parens patriae power to provide adequate medical care for its mentally ill citizens. At stake also was the state's police power to protect the community at large from an individual who was a danger to others. Inside the walls of Louisiana State Penitentiary at Angola, there can be little doubt that an unmedicated Michael Perry would be a danger to other inmates and the institution's employees, as well as a danger to himself. One need only look at the numerous suicide watches called at Angola to protect Perry from himself and others.

Putting these concerns aside, even if this Court were to grant Perry the authority to refuse all antipsychotic medication, the State of Louisiana would be placed in a Catch-22 situation. The State could not forcibly medicate Perry, while at the same time, the Eighth Amendment under Woodall v. Foti, 648 F.2d 268 (5th Cir. 1981) requires a state to provide adequate psychiatric care to incarcerated inmates. If an inmate proves that the penitentiary has shown a

"deliberate indifference" to his psychiatric needs, then the inmate has stated a cause of action under 42 U.S.C.A. § 1983. The Haldol treatment Perry has received is a necessary and reasonable psychiatric treatment required for his mental health and well-being. It would indeed be anomalous for this Court to hold that this very treatment required by the Eighth Amendment would at the same time violate that same amendment.

In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976) this Court held that deliberate indifference to an inmate's medical needs was cruel and unusual punishment under the Eighth Amendment. Would it not indeed be cruel and unusual punishment for the State of Louisiana to refuse Haldol medication to Perry and let him languish in a world filled with delusions and hallucinations? Would this mental torture be the infliction of pain without any legitimate penological purpose? The State of Louisiana posits that such indifference would violate Perry's rights under the Eighth Amendment. Therefore, this Court must recognize Louisiana's parens patrie power to administer, forcibly if necessary, antipyschotic medication to a mentally ill inmate. As Blackstone once said, the sovereign or his representative is "the general guardian of all infants, idiots, and lunatics." Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 255, 92 S.Ct. 885, 888, 31 L.Ed.2d 184 (1972) , citing from 3 W. Blackstone, Commentaries 47. Based on its parens patrie power, Louisiana has the power to do what is best for its citizens, including mentally ill death row inmates.

4. Federal and state statutory laws support the State of Louisiana's position that a finding of incompetency mandates the necessity of medical treatment.

The State of Louisiana will fully discuss in its argument on Issue II, infra, the reasons that support the State's position that the trial court's finding of competency, but competent only while medicated, implied the necessity of medical treatment, either with or without Perry's consent. At this point it suffices to state that both federal and Louisiana statutory law subsumes the necessity of medical treatment within a finding of mental incompetency.

Under 18 U.S.C. § 4245, once a pre-trial detainee is declared incompetent to stand trial, the individual is ordered to the custody of the U.S. Attorney General for treatment. In pertinent part, the statute provides:

> "If, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the person to the custody of the Attorney General. The Attorney General SHALL HOSPITALIZE THE PERSON FOR TREATMENT in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of the sentence of imprisonment, whichever occurs earlier." (Emphasis provided.)

This federal statute is based on the premise that once an individual is judicially determined to be incompetent to stand trial, the individual is then committed to a suitable facility for care or treatment. Under 18 § 4243 an insanity acquittee may be conditionally released on an order that the individual comply with a prescribed regimen of medical care.

As argued extensively in our brief to the Louisiana Supreme Court (see Appendix A, pp. 116-169), the State's position is that Louisiana's statutory law subsumes the necessity of medical treatment within a finding of incompetency. Simply stated, when Perry raised the issue of his competency to be executed, he implicitly authorized the State to medicate him if necessary to achieve and maintain competency. While Louisiana has no statutory laws governing competency to be executed, all other similar statutes dealing with competency to stand trial, civil committees, inmates who are found to be a danger to themselves or others, insanity acquittees, and probationers or parolees, imply an authorization to administer medical treatment once incompetency has been established. For example, La. C.Cr.P. art. 648 provides, in pertinent part, that the court "shall commit the defendant...for...treatment, as long as the lack of capacity continues." If a Louisiana court can constitutionally order a pre-trial detainee under art. 648 to submit to medical treatment once incompetency is established, the State must certainly have the same power over a death row inmate, who has invoked the shield of incompetency as a means to stay his execution. Furthermore, La. R.S. 28:55(I) provides in pertinent part regarding involuntarily committed persons that "[a] patient confined to a treatment facility by judicial commitment may receive medication and treatment without his consent...." It would be anomalous if a civil committee can be treated without his consent and a death row inmate cannot be so treated.

5. Petitioner has failed in his burden of proof to show any national consensus against forcibly medicating a condemned prisoner.

In determining the "evolving standards of decency that mark the progress of a maturing society," as announced in Trop v. Dulles, supra, this Court has looked not to the individual standards of decency held by each justice, but to society's standards of decency, especially those standards reflected in the statutes enacted by society's elected representatives. This practice of referring to the laws of the fifty states was followed by this Court in its major death penalty cases including Ford, Penry and Stanford v. Kentucky, ___U.S.____, 109 S.Ct. 2969, ___L.Ed.2d ____ (1989). The State of Louisiana respectfully submits that the petitioner has not established a national consensus against forcibly medicating a death row inmate in order to achieve and maintain competency for execution. Unless Perry does so, his claim that nonconsensual treatment violates his Eighth Amendment right lacks merit.

Finally, Perry has also failed to point to any conflict in the district courts as to forcibly medicating either involuntarily detained civil committees or pre-trial detainees. In U.S. v. Charters, 863 F.2d 302 (4th Cir. 1988), the Court of Appeals, on rehearing, held that a pre-trial detainee who had been found incompetent to stand trial could be forcibly medicated, as long as the government's action was not arbitrary or capricious, and as long as professional medical judgment was exercised and subject to judicial review. The Third Circuit of the U.S. Court of Appeals in Rennie v. Klein, 720 F.2d 266 (3rd Cir. 1983) held that a civil committee who was involuntarily placed in a mental facility could be forcibly medicated, provided accepted professional judgment was exercised and provided that the treatment regimen was one accepted within the medical community. The State of Louisiana argues that in the context of a death penalty case, the state's countervailing interest in retribution should override any interest Perry may retain in refusing antipsychotic medication. The medication is administered to Perry only under the exercise of professional medical judgment. Because the petitioner can point to no conflict in the district courts, and because the petitioner does not contend that any Louisiana statute as applied to him is unconstitutional, he has not supported his contention that a writ of certiorari should be granted.

ISSUE II.

Assuming that: (1) competency to be executed may be medically achieved and maintained through nonconsensual, medically supervised treatment; and (2) the condemned inmate has a remaining constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to such treatment?

A. Pretext

The petitioner asserts that he is (1) insane and/or incompetent; (2) that he has a right to refuse medical treatment designed to achieve his competency to be executed; and (3) that the trial court violated his procedural due process rights in the conduct of the hearing to determine competency to be executed and the subsequent order to submit to medical treatment.

Several matters must be addressed prior to beginning an analysis of these assertions. The State notes that the above issues are outlined by the undersigned writer. This was done because the inmate's several lawyers have failed to coherently delineate and analyze the issues. It was left to the respondent to discern their complaints from a confused, inarticulate petition for certiorari.

Second, it is important to recognize that this inmate has never been declared either insane or incompetent prior to or during the trial of this horrendous crime. Although inmate's counsel states in his third sentence of the brief that Perry "was found incompetent to proceed to trial several times", (see Pet.'s Brief, p. 4), such contention is simply incorrect. There is absolutely no such conclusion anywhere in the trial record. Such a misstatement is an example of inmate counsel's petition, which is replete with mischaracterizations.

Third, the claimed right to refuse medical treatment (designed to achieve competency to be executed) cannot be an absolute, categorical precept. If it were, then we would be giving the death row inmate the universal authority to choose a life of madness over a valid sentence of death. The right to refuse medical treatment must necessarily be a flexible right which is hinged on several variables. As stated in Argument I

supra, the inmate's right to refuse medical treatment is either extinguished upon rendition of a valid sentence of death, or, it is a right which must be weighed against state interests on a case-by-case basis.

Fourth, it is pertinent that this death row inmate has never been compelled to accept undesired medical treatment. Although inmate's counsel would have this Court believe that he was medicated in violation of a Louisiana Supreme Court stay order, (See Pet.'s Brief, p. 21, Note 12), this contention is erroneous. In short, this same contention was presented to the Louisiana Supreme Court and its answer was a writ denial. _____ So.2d _____ (La. 1989) (Nos. 88-KD-2239 and 89-KA-0159) (May 12, 1989) reconsideration denied, ____ So.2d _____, (La. 1989)(June 16, 1989). More important, is the fact that this inmate can point to no evidence in the record which buttresses his argument that he has been subjected to unwanted medical treatment. The testimony of several physicians demonstrates that Perry improves with medication and occasionally requests that he receive treatment. Thus, it appears that the matter now under consideration does not focus on an alleged deprivation of an assumed right to refuse medical treatment, but focuses upon an anticipated deprivation of the assumed right to refuse medical treatment. The anticipated deprivation to supposedly arise from the trial court's order. The trial court determined Perry to be competent when medicated and consequently ordered the Department of Corrections medical staff to provide nonconsensual medical treatment in order to maintain his competency to be executed. The condemned inmate is now applying for certiorari based upon treatment he anticipates occurring in the future.

This opposition to petition for certiorari rests upon several givens and assumptions. Given is the fact that the State of Louisiana has a death penalty for first degree murder. See LSA-R.S. 14:30. Also given is the fact that Ford v. Wainwright, supra, requires an inmate to be competent in order to be executed.

Assumed, is the proposition that medically achieved and maintained competence is sufficient to satisfy the Eighth Amendment right enunciated in Ford. Also assumed is the condemned inmate's proposition that he has a protected liberty interest in refusing medical treatment designed to achieve

competency to be executed.[5]

In view of the above givens and assumptions, the remaining questions are:

> (1) Was the trial court's determination of incompetency made in accord with procedural due process as set forth in Ford v. Wainwright?
>
> and
>
> (2) Did the trial court err in ordering treatment (to achieve competency) premised upon a determination of incompetency. Restated, does procedural due process require a second adversarial, adjudicative determination prior to treatment if the inmate refuses treatment?

B. Argument

The proceedings below conclusively demonstrate that the death row inmate was correctly ordered to receive nonconsensual, medically supervised treatment designed to achieve competency to be executed; all in accord with procedural due process as mandated by the Fourteenth Amendment through Ford v. Wainwright.

1. The trial court's determination of incompetency (i.e., competency achieved through the use of antipsychotic medication) was made in accord with procedural due process as set forth in Ford v. Wainwright.

The trial court ruled as follows:

> For these reasons, it is ordered that the defendant, Michael Owen Perry, is mentally competent for purposes of execution, and that he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment. Since the defendant's competency is achieved through the use of antitropic [sic] or

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5. Implicit in the claim of, or recognition of, any liberty interest to refuse treatment is the apparent negating of the inmate's initial claim that mental illness per se is a bar to execution. This argument is apparently unacceptable in view of Penry v. Lynaugh. In Penry, this Honorable Court rejected the proposition that retardation per se, pursuant to the Eighth Amendment, precludes the imposition of the death penalty.

(2) An opportunity to challenge and/or impeach the expert's opinions on the ultimate question at issue (J. Marshall's plurality);

and (3) The guarantee of an impartial officer to receive argument and evidence from the prisoner, including expert psychiatric evidence that may differ from the State's own psychiatric examination. (J. Marshall's plurality and J. Powell's concurrence).

The State of Louisiana submits that Perry was afforded procedural due process in excess of constitutional requirements.

(b) The procedural due process which in fact accompanied the trial court's determination of Perry's competency to be executed exceeded de minimus federal constitutional standards.

The condemned inmate was afforded a vast array of rights and privileges in the course of determining his competency to be executed. The procedural protections afforded to him exceeded even the most strident prerequisites of Ford. Basically, the trial court afforded to the inmate:

(i)The privilege of assistance of counsel;

(ii)The privilege of compulsory process;

(iii)The right to present evidence on his behalf;

(iv)The opportunity to choose half of the members of the sanity commission which evaluated him;

(v)The right to challenge and impeach the expert's opinions on the ultimate issue of competency to be executed;

(vi)The privilege to participate in an adversarial hearing;

(vii)The privilege to testify as a witness and be videotaped for posterity;

(viii)The right to an independent and neutral decisionmaker outside of the executive branch of government;

(ix)The privilege of judicial review.

For a more detailed explanation of each of these rights and privileges, refer to the State's Opposition to Petition for Supervisory Writs, Louisiana Supreme Court, March 30, 1989. (Attached hereto as Appendix A). Specifically, refer to Section XI.

The only remaining question is whether some error occurred during the hearing process.

(c) The trial court's conduct of the competency hearing was impeccable, and certainly manifested no error of constitutional dimensions.

The inmate's petition for certiorari offers a smorgasbord of alleged trial court errors. (See Pet.'s Brief, pp. 30-35). All available "buzzwords" were shoveled to this Honorable Court. The complaints lack merit. Each of the current allegations was addressed and rebutted in the State's brief to the Louisiana Supreme Court (See App. A). Specifically, Sections XI(B)-(E), pp. 173-212, respond to and disprove the current arguments that the trial court erred during the conduct of the competency hearing.

Petitioner inmate now proposes that the trial court erred in accepting three updates on the inmate's medical condition. He characterizes the reports (which were filed in the trial record) as "ex parte Communication with the State." (See Pet.'s Brief, p. 30). Such characterization is inaccurate in light of the fact that the reports were offered by amicus curiae, who was custodian of the inmate, and were contemporaneously filed in the trial record for all parties to examine and act upon.

The State respectfully suggests that the trial court's receipt of continuing medical updates of the condemned inmate was not error. In fact, we suggest that it was highly pertinent and relevant material, without which, the factfinder may have made an ill-informed judgment concerning the inmate's fate. An ill-informed judgment can not be countenanced by anyparty or court. See Ford, supra, at 2606 and Ford, at 2611 (Powell, J., concurring).

Furthermore, we believe that there is an affirmative duty on the part of custodians who are entrusted with the treatment of incompetent inmates to periodically update the committing court. For example, in United States v. Curry, 410

F.2d 1372 (4 Cir. 1969) the Fourth Circuit stated that there "should be a requirement that the custodian report to the court on a prescribed schedule the mental health of his ward." at p. 1374. Also, in In re Harmon, 425 F.2d 916 (1 Cir. 1970) the First Circuit set out guidelines for psychiatrists who are responsible for the treatment of pre-trial detainees determined to be incompetent to stand trial. The Court stated "if the accused is committed to the custody of the Attorney General pursuant to 18 U.S.C. §4246, the district court should require frequent reports on the accused's mental condition at stated intervals." at p. 918. Also see United States v. Geelan, 520 F.2d 585 (9 Cir. 1975).

Based on Ford's dictate that competency decisions be premised upon all available evidence; and upon Justice Powell's concurrence "that ordinary adversarial proceed[ings] ... are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity" -- Ford, supra, at p. 2611 -- as well as the aforecited circuit court's expectation of medical updates by custodians; we suggest that the trial court committed no violation of procedural due process guaranteed to the condemned inmate.

To summarize, the trial court's conduct of the competency proceedings exceeded the procedural due process required by this Honorable Court in Ford. Moreover, the trial court committed no error of constitutional dimension by accepting medical updates on the condition of Michael Owen Perry. Therefore, petitioner's application for certiorari should be denied.

2. The trial court correctly ordered treatment of the condemned inmate based upon the determination of incompetency to be executed (i.e., competent only when maintained on medication.)

It is important to immediately recall that the trial court found that Perry was "competent for execution ....only while maintained on psychotropic medication in the form of Haldol." (R. p. 41). From this determination, we respectfully suggest that Perry may be incompetent when treatment is either denied or refused. The trial court's conclusion that treatment is necessary to maintain competence equates to a determination that Perry is incompetent without treatment. We believe that the trial court acted correctly when he ordered the Department of Corrections medical staff to treat Perry to maintain competency for execution.

The condemned inmate seems to argue that the trial court acted improvidently by ordering treatment without an additional adversarial, adjudicative determination on the subject of Perry's incompetency to make treatment decisions. This contention is misplaced.

There are several facts which are relevant to a determination of whether due process requires multiple adversarial, adjudicative proceedings. First, we must recall that the trial court concluded, as a matter of law, that Perry is competent only when medicated. Second, it is abundantly clear that he is not competent for execution, according to Ford, when not properly administered antipsychotic medication. Third, the doctors and the trial court agree that Perry is in need of medication because of his condition. Fourth, all doctors agree that Perry improves, to the level of competency to be executed, with the administration of antipsychotic medication. Fifth, the administration of antipsychotic medication is an approved and recommended treatment regimen for the diagnosed condition of schizoaffective disorder. And sixth, Perry has asserted, claimed and carried the burden of proving his (A) incompetency to be executed when unmedicated and (B) his need for treatment.

The combination of factors listed above mandates a finding that the trial court correctly ordered treatment of the condemned inmate premised upon a single finding of incompetency to be executed without treatment.

(a) This Court's decision in Vitek v. Jones implicitly recognizes and authorizes nonconsensual medical treatment upon a due process determination that treatment is necessary.

In Vitek v. Jones, 445 U.S. 80, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) an inmate brought an action challenging the constitutionality, on procedural due process grounds, of a Nebraska statute which allowed the Department of Correctional Services to transfer any prisoner to a mental hospital upon a physician's finding that the prisoner is suffering from a mental disorder. The issue, according to Justice White, was whether the involuntary transfer of a Nebraska state prisoner to a mental hospital for treatment implicates a liberty interest that is protected by the due process clause. This Court held that Jones' transfer to a mental hospital for the purpose of psychiatric treatment implicated a liberty interest protected by the Due Process Clause. Vitek, 100 S.Ct. at 1264. The apparent rationale for this Court's conclusions of a liberty interest insured by procedural protections was "the

stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness ....Ibid; emphasis provided.) Further, this Court identified the prisoner's interest as "not being arbitrarily classified as mentally ill and subjected to unwelcome treatment...." Vitek, 100 S.Ct., at 1265. (Emphasis provided).

The above passages reveal this Court's finding that treatment necessarily follows a transfer to the mental hospital. Such finding is quite relevant to the current issue. The trial court below determined that treatment was authorized after a finding that treatment was necessary. In Vitek, this Court approved of a similar analysis. That is, once Nebraska determined the need for transfer (i.e., that the prisoner suffered from a mental defect which required treatment), then the authority to treat was available to the hospital officials. Implicit is that the hospital officials did not have to return to court for an additional adversarial, adjudicative proceeding to determine if the prisoner is competent to make decisions regarding his treatment. The determination of need for treatment in Jones' case was the authority for hospital officials to subject him to "involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness...." Vitek, 100 S.Ct. at 1264. The State suggests that the trial court's conclusion of need for treatment is sufficient authority for the Department of Corrections medical staff to involuntarily administer antipsychotic medication to the condemned inmate. There is no need to conduct an additional hearing on the question of competency to refuse medication.

Recognition of the notion that an inmate is entitled to a single hearing prior to initiation of involuntary treatment is found in Baugh v. Woodard, 808 F.2d 333 (4 Cir. 1987). In Baugh, the Fourth Circuit rejected a suggestion that a due process required hearing must occur prior to the inmate's physical transfer to a mental health unit and before involuntary treatment began. Baugh, 808 F.2d at. 337.

In Stensvad v. Reivitz, 601 F.Supp. 128 (W.D. Wis. 1985) an involuntarily committed mental patient brought an action challenging nonconsensual drug treatment. At issue was whether a Wisconsin statute, which provided for no right to refuse drug treatment on behalf of involuntarily committed mental patients, was unconstitutional. The Court rejected the

constitutional challenge stating "that an involuntary commitment is a finding of incompetency with respect to treatment decisions. Nonconsensual treatment is what involuntary commitment is all about." Stensvad, 601 F.Supp, at 131. From Stensvad, it appears that Vitek has been interpreted to mean that a decision to commit amounts to the authority to treat despite the expressed desires of an involuntarily committed mental patient. Further, if such an interpretation of Vitek can apply to a mental patient, we suggest it applies with even greater force to a death row inmate.

In Lappe v. Loeffelholz, 815 F.2d 1173 (8 Cir. 1987) an inmate brought a 1983 action against prison officials to challenge the forcible injection of medication without a hearing as a violation of due process. At issue was whether the prison officials were entitled to qualified immunity on the basis that no right to refuse forcible medication had been "clearly established" by Vitek jurisprudence. "Lappe argue[d] that Vitek [citation omitted] clearly established that the fourteenth amendment entitled him to another hearing before he could be subjected to forced behavior modification." (Emphasis provided.) Lappe, 815 F.2d at 1176. The court rejected Lappe's contention. The court reasoned that "[O]nce Lappe was given a full hearing on the issues of his involuntary commitment and need for medication, it is not clear that the forced administration of Haldol deprived him of the protections established in Vitek." Ibid. The court also stated that "Lappe's liberty interest in not being classified and treated as a mentally ill individual was extinguished when he had his first hearing according to the procedures established in Vitek." Lappe, 815 F.2d at 1177.

Like Lappe, Perry received a trial court determination of his incompetency and corollary need for treatment. Like Lappe, Perry has received all necessary procedural due process prior to a nonconsensual, medically supervised administration of antipsychotic medication. Vitek and its progeny simply do not require an additional adversarial, adjudicative hearing prior to the forcible administration of medication which will maintain competency to be executed. Simply put, a single hearing and finding of incompetency is sufficient to authorize treatment by medical officials.

This position is supported by Dautremont v. Broadlawns Hospital, 827 F.2d 291 (8 Cir. 1987). In Dautremont, a former psychiatric patient brought a 1983 action against a hospital and physicians for deprivation of due process arising out of the involuntary administration of psychotherapeutic drugs. The court rejected the claim. Most significant to this case is

that the court accepted an Oklahoma commitment hearing as satisfaction of Iowa's authority to forcibly treat the patient. The court stated that "the pre-Oklahoma hospitalization hearing provided Dautremont all the process he was due in these circumstances." Dautremont, 827 F.2d at 197. This conclusion, of no need for a second hearing by a different state is indeed remarkable. It forcefully demonstrates that a second hearing would be duplicitious and fail to meaningfully advance any interest protected by the due process clause.

The State of Louisiana suggests that Dautremont is authority for the trial court's conduct of Perry's proceedings. The trial court's conclusions of competency only when medicated; Perry's need of the medication; the fact that Perry improves with the medication; the determination that the medication is an approved form of treatment for the illness; and the recognition that Perry proved his own need for treatment all support our contention that the trial court correctly ordered involuntary treatment.

(b) Should there be a due process requirement of an additional authorization to treat the condemned inmate; then Youngberg v. Romeo and U.S. v. Charters dictate that such decision is left to the professional judgment of the appropriate medical personnel at the custodial institution.

Alternatively, if this Honorable Court determines that: (1) a finding of incompetency to be executed does not amount to authority to involuntarily treat the condemned inmate; and (2) that the inmate retains a residual liberty interest in deciding whether to accept medical treatment designed to maintain competency; then the State suggests that the decision to involuntarily treat be left to the "professional judgment" of supervising doctors rather than an additional adversarial adjudicative proceeding.

In Youngberg v. Romeo, 457 U.S. 305, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) this Honorable Court considered several questions, among them what was the proper standard for determining whether a state has adequately protected the rights of the involuntarily committed mentally retarded. If we assume that (1) inmate Perry's right to refuse medical treatment exists despite his conviction and sentence, and (2) that he retains a liberty interest as great as Romeo's; then we must determine how Perry's interests are to be judged and by whom. We suggest that Youngberg answers this question. This Court stated in Youngberg that "the decision, if made by a professional, [footnote omitted] is presumptively valid,

liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. [footnote omitted]" Youngberg, 102 S.Ct. at 2462.

The Youngberg court seems to suggest that Perry's right to refuse medical treatment (designed to achieve his competency) can be assessed by professionals in the course of their duties rather than by an additional adversarial adjudicative proceeding.

In United States v. Charters, 863 F.2d 302 (4 Cir. 1988) (rehearing en banc), cert. applied for _____ U.S. _____, 44 Cr.L. 4178 (Feb. 14, 1989), an involuntarily committed pre-trial psychiatric patient appealed a district court order permitting the nonconsensual administration of antipsychotic medication. [6] The Charters issue may be restated as follows: Does the nonconsensual administration of antipsychotic medication, without a judicial determination that the patient is incapable of making his own medical decisions, unconstitutionally impinge upon protected liberty interests? The court, on rehearing, essentially concluded that the base-line decision to medicate should be made by appropriate medical personnel of the custodial institution, with judicial review available to guard against arbitrary governmental action.

The court stated "there is no requirement that, as a matter of due process, every medication decision by responsible medical professionals be submitted by the government for prior judicial approval before proceeding to carry it out." Charters, 863 F.2d at 314.

Further, the court rejected the proposition that an adjudicated incompetent (for commitment purposes) can simultaneously maintain his competence to decide his own "best interests in receiving or declining medication." Charters, 863 F.2d at 310.

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6. The Fourth Circuit presumed that a legally confined person nonetheless retained an interest in refusing antipsychotic medication. In Charters, the government did not, as Louisiana suggests in II(A) above, assert that the supposed retained interests were displaced as "incidental to the basis for legal institutionalization." Charters, 863 F.2d at 305.

Counsel for the condemned inmate has suggested to both the trial court and the Louisiana Supreme Court that Perry is entitled to an additional adversarial, adjudicative proceeding to determine his competence to decline medical treatment. He has also suggested that it is incumbent upon the trial court to make a "substituted judgment" of Perry's "best interests" if it is determined that Perry is incompetent to refuse treatment.

The State of Louisiana contends that such requirements are unnecessary and unworkable. Without offering multiple rhetorical questions to demonstrate the folly in such an approach, let it be said that few sane death row inmates will choose death over life.

Prior to Charters, United States District Courts have recognized that is is the duty of doctors, not courts, to decide whether an inmate is competent to refuse medication. See U.S. v. Bryant, 670 F.Supp. 840 (D. Minn. 1987); and U.S. v Leatherman, 580 F.Supp. 977 (D.D.C. 1983).

It is not a new premise to suggest that confined persons are not entitled to an additional court hearing on the question of forcible medication. We likewise suggest that, if Perry even retains any protected interests after his sentence of death and after a due process hearing on his competency to be executed, an additional adversarial, adjudicative proceeding is not required before forcibly medicating him.

CONCLUSION

Petitioner's writ of certiorari should be denied. First, there is no evidence in the record that the petitioner has been forcibly medicated with antipsychotic drugs. Second, the petitioner has also failed to carry his burden of proving a national consensus against forcibly medicating a condemned inmate. Finally, the petitioner's counsel has neither pointed to a conflict within the district courts, nor claimed Louisiana law as applied to the petitioner is unconstitutional. Therefore, the petitioner has stated no ground upon which certiorari could be granted. The State of Louisiana therefore entreats this Court to deny the petitioner's application for certiorari.

EAST BATON ROUGE PARISH
STATE OF LOUISIANA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Original Brief on Behalf of the State of Louisiana in Opposition to a Writ Application to the United States Supreme Court has been forwarded to Keith Nordyke, 427 Mayflower Street, Baton Rouge, La. 70802; Joseph Giarrusso, Jr., 643 Magazine Street, New Orleans, La. 70130; Annette Viator, Staff Attorney, La. Dept. of Corrections, P.O. Box 94304, Baton Rouge, La. 70804; and the Honorable L. J. Hymel, Jr., Judge, by placing same in the U. S. Mails, postage prepaid.

Baton Rouge, Louisiana, this 26th day of September, 1989.

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BY: Rene Salomon
RENE SALOMON
Assistant Attorney General

SWORN TO AND SUBSCRIBED before me, Notary Public, this 26 day of September, 1989.

NOTARY PUBLIC